IN THE SUPREME COURT OF THE STATE OF NEVADA

STARR SURPLUS LINES INSURANCE CO.,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA in and for the County of Clark and THE HONORABLE MARK DENTON, District Judge,

Respondents,

and

JGB VEGAS RETAIL LESSEE, LLC,

Real Party in Interest.

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Case No.: 84986

Eighth Judicial District Court
Case No.: A-20-816628-B

REAL PARTY IN INTEREST'S (1) THIRD NOTICE OF SUPPLEMENTAL AUTHORITIES IN SUPPORT OF ITS ANSWER TO PETITION FOR WRIT OF MANDAMUS OR, IN THE ALTERNATIVE, PROHIBITION, AND (2) RESPONSE TO PETITIONER'S THIRD NOTICE OF SUPPLEMENTAL AUTHORITIES

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Pursuant to NRAP 31(e), Real Party in Interest JGB Vegas Retail Lessee, LLC ("JGB") respectfully submits this Third Notice of Supplemental Authorities to bring to the Court's attention two recent decisions issued after the close of briefing: (1) *Coast Restaurant Group, Incorporated v. AmGUARD Insurance Company*, 2023 WL 2850023 (Cal. Ct. App. Apr. 10, 2023); and (2) *Starlight Cinemas, Incorporated v. Massachusetts Bay Insurance Company*, 2023 WL 3168354 (Cal. Ct. App. May 1, 2023). JGB also hereby submits its Response to Petitioner Starr Surplus Lines Insurance Co.'s ("Starr") Third Notice of Supplemental Authorities ("Third Starr Notice"), as allowed by NRAP 31(e).

I. JGB'S THIRD NOTICE OF SUPPLEMENTAL AUTHORITIES

As set forth in JGB's Answer, the phrase "direct physical loss or damage" in an "all-risks" property insurance policy provides coverage "when a deadly physical substance like SARS-CoV-2/COVID-19 either (1) is present on or around covered property, rendering it partially or wholly unusable, unsafe or unfit for its intended purpose ('physical loss') or (2) alters the surfaces or air of covered property ('physical damage')." *See* JGB's Answer at 1, 13-17. Petitioner argues that physical alteration is a prerequisite to coverage and government orders do not constitute direct physical loss or damage, purporting to rely in large part on California caselaw. *See* Starr's Petition at 13-21; Starr's Reply at 8-12, Third Starr Notice at 2. Two recent decisions demonstrate the unsettled state of California law as to the meaning of "direct physical loss or damage."

In *Coast Restaurant*, the California Court of Appeal, Fourth District, held that "physical alteration to covered property" is **not** required "to trigger coverage under a 'physical loss or damage' insuring provision." 2023 WL 2850023, at *6. Rather, coverage can be triggered by a "governmental order that temporarily deprives the insured of possession and use of covered property" for its intended purpose. *Id.* at *4-5. The *Coast Restaurant* Court rejected the same argument Starr makes here—that physical alteration is required for consistency with the policy's "period of restoration," which states "physical loss or damage" continues until the property is "repaired, rebuilt, or replaced." *Id.* at *5; *see* Starr Petition at 19 n.7. The Court held that the "'period of restoration' only provides one method of calculating the duration of coverage, and does not purport to define the scope of coverage." *Coast Restaurant*, 2023 WL 2850023, at *5 (emphasis added); *see also* JGB's Answer at 25.

Coast Restaurant also distinguished *MRI Healthcare Center of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 115 Cal.Rptr.3d 27 (Ct. App. 2010)—a case which Starr cites[1]—on the ground that the policy language there "only covered 'accidental direct physical loss,' without any mention of 'damage.'" *Id.* at *5. By contrast, "where 'loss' and 'damage' are both included in the insuring clause, as in the policy here,

[1] *See* Starr Petition at 24.

'loss' must mean something different from 'damage.'" *Id.* at *6. Even if "[p]hysical damage" could require physical alteration to property, "physical loss" does not; accordingly, "there can be coverage under the policy for governmental orders resulting in loss of use." *Id*.

Shortly after, the Second District California Court of Appeal "disagree[d] with [its] colleagues in *Coast* [*Restaurant*]" that "a temporary deprivation of an insured's right to use covered property constitutes . . . 'direct physical loss of or damage to property.'" *Starlight Cinemas*, 2023 WL 3168354, at *9. Instead, *Starlight Cinemas* held that physical loss or damage "requires a physical alteration of the covered property," which the policyholder there did not allege. *Id.* at *8.

The dichotomy between *Coast Restaurant* and *Starlight Cinemas* underscores that, contrary to Starr's claims, California law is unsettled on these issues and thus, cannot be used to predict Nevada law. *See* JGB's First and Second Notices of Supplemental Authorities. Until the California Supreme Court rules in *Another Planet Entertainment, LLC v. Vigilant Insurance Company*, No. S277893, *certified question granted* (Cal. Mar. 1, 2023), the state of California law concerning the interpretation of the phase "physical loss or damage" in the COVID-19 coverage context remains unsettled. *See* JGB's Second Notice of Supplemental Authorities at 2-3. However, the fact that multiple California appellate courts have held physical loss or damage occurs where SARS-CoV-2/COVID-19 renders property partially or

wholly unusable or unfit for its intended purpose, or physically alters property, signals that JGB's interpretation is at least reasonable and therefore controls. *See* JGB's Answer at 1, 3-4, 14-17; *Century Sur. Co. v. Casino W., Inc.*, 130 Nev. 395, 400-01, 329 P.3d 614, 617-18 (2014) (authority in support of policyholder's interpretation suggests interpretation is reasonable, even though contrary authority also exists).

II. RESPONSE TO THIRD STARR NOTICE

The Third Starr Notice advises the Court of four out-of-state rulings and one federal Nevada district court ruling. Three of these cases concern the phrase "direct physical loss or damage" and two concern a pollution and contamination exclusion with language different from Starr's exclusion.[2] Like nearly all of the cases Starr cited in its briefing, two of the three physical loss or damage citations were orders-only cases—*i.e.*, the policyholders failed to allege that SARS-CoV-2 was present on and rendered insured property unusable for its intended purpose, or that

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[2] *Arminas Wagner Enterprises, Inc. v. Ohio Sec. Ins. Co.*, 2023 WL 2072499 (D. Nev. Feb. 17, 2023); *Rose's 1, LLC v. Erie Ins. Exch.*, 290 A.3d 52 (D.C. 2023); *Cajun Conti LLC v. Certain Underwriters at Lloyd's, London*, 2022-01349 (La. 3/17/23); *Detroit Ent., LLC v. Am. Guarantee & Liab. Ins. Co.*, 2023 WL 2392031 (E.D. Mich. Mar. 7, 2023); *In-N-Out Burgers v. Zurich Am. Ins. Co.*, 2023 WL 2445681 (9th Cir. Mar. 10, 2023).

SARS-CoV-2 physically altered and damaged insured property.[3] *See* Answer at 25-26 (explaining the same defect in nearly all of Starr's cited cases). Thus, these citations should not be instructive here. The third decision ruled that remediation actions (*e.g.*, cleaning toxic particulates) can constitute the physical alteration of property needed to trigger coverage, but the policyholder there had not provided any evidence that it remediated property.[4] JGB, in contrast, provided substantial unrebutted evidence showing it undertook extensive physical remediation efforts to restore its property to its pre-COVID condition. *See* Answer at 25.

Starr's fourth and fifth citations, *In-N-Out Burgers* and *Detroit Entertainment*, concern a pollution and contamination exclusion. Unlike JGB, however, the policyholders in *In-N-Out Burgers* or *Detroit Entertainment* did not argue that pollution and contamination exclusions like Starr's are fatally overbroad and limited to traditional environmental pollution events, as both the Nevada and California Supreme Courts held years ago. *In-N-Out Burgers*, 2023 WL 2445681, at *1-2;

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[3] *See Arminas*, 2023 WL 2072499, at *4; *Rose's 1*, 290 A.3d at 57. In addition, *Arminas* bases its coverage analysis on *Circus Circus LV, LP v. AIG Specialty Ins. Co.*, 525 F. Supp. 3d 1269 (D. Nev. 2021), which the Ninth Circuit upheld based on predictions of California law that it now admits were premature, if not incorrect. *See* JGB's Second Notice of Supplemental Authorities at 2-4; *Another Planet Ent., LLC v. Vigilant Ins. Co.*, 56 F.4th 730, 732-34 (9th Cir. 2022). Moreover, there is no sound basis to declare Nevada law based on predictions of unsettled California law when the very issue being predicted is currently before this Court.

[4] *Cajun Conti*, 2022-01349, at *7-8 (La. 3/17/23).

Detroit Entertainment, 2023 WL 2392031, at *6-12; *compare* JGB Answer at 28-29 (citing *Casino W.*, 130 Nev. at 400-01, 329 P.3d at 617-18).[5]

In-N-Out Burgers simply failed to address the controlling California Supreme Court precedent on that issue.[6] *Detroit Entertainment* was decided under Michigan law, and to the extent that Michigan does not adhere to the rule that pollution and contamination exclusions are limited to traditional environmental pollution events, it is contrary to *Casino West* and therefore not instructive here.[7] Finally, multiple courts other than *C.J. Segerstrom & Sons v. Lexington Insurance Company*, 2023 U.S. Dist. LEXIS 33293 (C.D. Cal. Feb. 27, 2023), have rejected application of pollution and contamination exclusions to COVID-related loss and damage, contrary

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[5] By virtue of this Court's ruling in *Casino West*, Starr has been on notice since at least 2014 that pollution and contamination exclusions like its own are limited to traditional environmental pollution, which does not encompass an unprecedented pandemic.

[6] *See MacKinnon v. Truck Ins. Exch.*, 73 P.3d 1205, 1213-18 (Cal. 2003), *as modified on denial of reh'g* (Sept. 17, 2003) (limiting pollution and contamination exclusion with terms identical to Starr's to traditional environmental pollution, even though substance at issue (pesticide) fit within exclusion's broad definition of pollutant); *Casino W.*, 130 Nev. at 399-401, 329 P.3d at 616-18 (similarly limiting pollution and contamination exclusion even though carbon monoxide fit within exclusion's broad definition of pollutant).

[7] *See Casino W.*, 130 Nev. at 399-401, 329 P.3d at 617-18 (rejecting cases that find "the exclusion is unambiguous and applies to all types of pollution") (citing *Apana v. TIG Ins. Co.*, 574 F.3d 679, 682 (9th Cir. 2009), which includes *McKusick v. Travelers Indem. Co.*, 632 N.W.2d 525, 531 (Mich. App. 2001) among cases that "apply the exclusion literally because they find the terms to be clear and unambiguous").

to Starr's claim of unanimity.[8] *See, e.g.*, *Novant Health Inc. v. Am. Guarantee & Liab. Ins. Co.*, 563 F. Supp. 3d 455, 460-62 (M.D.N.C. 2021) (denying dismissal of COVID-19 coverage claim based on contamination exclusion with same language as *In-N-Out Burgers* and *Detroit Entertainment*); *Procaccianti Cos. v. Zurich Am. Ins. Co.*, 2021 U.S. Dist. LEXIS 257644, at *1 (D.R.I. Sep. 2, 2021) (same); *Sacramento Downtown Arena LLC v. Factory Mut. Ins. Co.*, 2022 WL 16529547, at *5 (E.D. Cal. Oct. 28, 2022) (similar).

JGB respectfully submits that this Court should adhere to longstanding principles of Nevada law and define the phrase "physical loss or damage" as including the presence of a deadly physical substance like SARS-CoV-2 that either (1) renders property partially or wholly unusable, unsafe or unfit for its intended purpose or (2) alters the surfaces or air of covered property.

Dated May 15, 2023

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[8] *See* Third Starr Notice at 5 & n.1.

CERTIFICATE OF SERVICE

I certify that I am an employee of Lemons, Grundy & Eisenberg and that on this date the foregoing document was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

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I further certify that on this date I served a copy of the foregoing by depositing a true and correct copy, postage prepaid, via U.S. mail to:

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